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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

THE BURKE FAMILY LIVING TRUST,

Plaintiff,

v.

METROPOLITAN LIFE INSURANCE  
COMPANY, a mutual company incorporated  
in New York State, a foreign insurance  
company,

Defendant.

Case No. C09-5388 FDB

ORDER DENYING MOTION  
FOR REMAND TO SUPERIOR  
COURT

This matter comes before the Court on Plaintiff's Objection to Removal to Federal Court. The Court construes the objection as a motion for remand to the state superior court. After reviewing the pleadings submitted by the parties and relied upon for authority, the Court is fully informed and hereby denies the motion to remand.

**Introduction and Background**

On may 28, 2009, Plaintiff filed a complaint in Thurston County Superior Court of Washington naming Metropolitan Life Insurance Company as the only defendant. Plaintiff's complaint alleges causes of action for breach of contract, breach of good faith, unreasonable denial of claim for insurance coverage, unfair settlement practices, and violation of the Washington

1 Consumer Protection Act. The complaint does not allege any federal causes of action. In the prayer  
2 for relief, Plaintiff seeks damages in an amount equal to the terms of the insurance policy, \$50,000,  
3 plus an award of reasonable attorney's fees and costs. Plaintiff also seeks an award of treble  
4 damages pursuant to the Washington Insurance Fair Practices Act and Consumer Protection Act,  
5 and an award of attorneys fees.

6 On June 26, 2009, Defendant Metropolitan moved the action to this Court asserting diversity  
7 jurisdiction. The Notice of Removal states that the action is one in which the United States District  
8 Court is given original jurisdiction by reason of diversity of citizenship pursuant to 28 U.S.C.  
9 §1332. Concerning the amount in controversy, the Notice of Removal states that "Plaintiff's claim,  
10 which seeks treble damages under both the Washington Insurance fair Conduct Act and Washington  
11 Consumer Protection Act, plus attorneys fees and costs, exceeds SEVENTY-FIVE THOUSAND  
12 DOLLARS (\$75,000)."

13 Plaintiff filed an objection to removal on the basis that Metropolitan has failed to establish  
14 that the case meets the \$75,000 jurisdictional requirement. Plaintiff states that the complaint seeks  
15 insurance policy benefits in the amount of \$50,000, and treble damages pursuant to the Consumer  
16 Protection Act that has a statutory ceiling of \$10,000. Plaintiff's counsel has also filed a post-  
17 removal declaration indicating that Plaintiff will not seek a total damage award of policy limits,  
18 treble damages and attorney fees, in excess of \$74,999.

19 Defendant filed a response (surreply to Plaintiff's objection) stating that it was evident from  
20 the face of the complaint the amount in controversy exceeds \$75, 000. Defendant asserts that an  
21 award of treble damages pursuant to the Washington Insurance Fair Conduct Act (IFCA) could  
22 reach \$150,000 (three times the \$50,000 contract value) and that under the Consumer Protection  
23 Act, Plaintiff could obtain an additional award of \$10,000. Defendant also contends that an award  
24 of attorney fees "will surely be sizable in the event this matter proceeds to trial." Thus, it is evident  
25 from the complaint that the \$75,000 jurisdictional amount is satisfied.

1 Plaintiff filed a response to Defendant's surreply contending that Defendant has failed to  
2 meet the burden of proof and that conclusory statements do not overcome the strong presumption  
3 against removal.

#### 4 Motion for Remand

5 The removal statute, 28 U.S.C. § 1441, provides that "any civil action brought in a State  
6 court of which the district courts of the United States have original jurisdiction, may be removed by  
7 the defendant or defendants, to the district court of the United States for any district ... where such  
8 action is pending." 28 U.S.C. § 1441(a). One instance in which the district courts of the United  
9 States have "original jurisdiction" is where there is complete diversity between the parties and the  
10 amount in controversy exceeds \$75,000. 28 U.S.C. § 1332(a)(1). The proper procedure for  
11 challenging removal to federal court is a motion to remand. A federal court must order remand if  
12 there is any defect which causes federal jurisdiction to fail, or if there is any defect in the removal  
13 procedure. 28 U.S.C. § 1447(c). The removal statutes are construed restrictively, and any doubts  
14 about removability are resolved in favor of remanding the case to state court. Gaus v. Miles, Inc.,  
15 980 F.2d 564, 566 (9<sup>th</sup> Cir. 1992). On a motion to remand, the removing defendant faces a strong  
16 presumption against removal, and bears the burden of establishing that removal was proper by a  
17 preponderance of evidence. Id. at 567; Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 403-04  
18 (9<sup>th</sup> Cir. 1996).

19 The removing defendant bears the burden of establishing federal jurisdiction, including any  
20 applicable amount in controversy requirement. Abrego Abrego v. The Dow Chemical Co., 443 F.3d  
21 676, 682-83 (9<sup>th</sup> Cir. 2006). The presumption against removal jurisdiction applies with particular  
22 force to defendant's arguments that complaint frames an amount in controversy that exceeds the  
23 jurisdictional minimum. Gaus, at 566; Rodgers v. Central Locating Service, Ltd., 412 F. Supp.2d  
24 1171, 1175 (W.D. Wash., 2006). Where the complaint does not specify the amount of damages  
25 sought, the removing defendant must prove by a preponderance of the evidence that the amount in

1 controversy requirement has been met. Abrego Abrego, at 683; Gaus, at 566-67; Sanchez v.  
2 Monumental Life Ins. Co., 102 F.3d 398, 404 (9<sup>th</sup> Cir. 1996). Conclusory allegations by the  
3 defendant will not suffice to overcome the traditional presumption against removal jurisdiction.  
4 Rodgers, at 1178; Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 375 (9<sup>th</sup> Cir. 1997).  
5 Instead, the courts may look beyond pleadings and consider other summary judgment type evidence  
6 relevant to the amount in controversy, tested as of the time of removal. Kroske v. U.S. BankCorp.,  
7 432 F.3d 976, 980 (9<sup>th</sup> Cir. 2005); Valdez v. Allstate Ins. Co., 372 F.3d 1115, 1117 (9<sup>th</sup> Cir. 2004).

8 The Court finds that it is not evident from the face of the complaint that the matter in  
9 controversy exceeds \$75,000. The sole damage figure is the claim for \$50,000 in death benefits  
10 pursuant to the insurance contract. The arguments addressed to other claims are not evident from  
11 the complaint.

12 The jurisdictional minimum may be satisfied by claims of general and specific damages,  
13 attorney's fees, and by punitive damages. Kroske v. U.S. Bank Corp., 432 F.3d 976, 980 (9<sup>th</sup> Cir.  
14 2005); Gibson v. Chrysler Corp., 261 F.3d 927, 946 (9<sup>th</sup> Cir. 2001); Galt v. Scandinavia, 142 F.3d  
15 1150, 1155-56 (9<sup>th</sup> Cir. 1998). In breach of contract cases, the jurisdictional minimum may be  
16 satisfied by all amounts for which defendant is allegedly liable, including attorney's fees and  
17 exemplary damages. See, e.g., Kroske v. U.S. Bank Corp., 432 F.3d 976, 980 (9<sup>th</sup> Cir. 2005).

18 Metropolitan's removal papers and pleadings assert that the matter in controversy exceeds  
19 \$75,000. Defendant has set forth the statutory basis for Plaintiff's claim for an award of treble  
20 damages in support of this contention. The Washington Consumer Protection Act permits a treble  
21 damage award not to exceed \$10,000. The Insurance Fair Conduct Act (IFCA) creates a private  
22 cause of action to a first-party claimant who has been unreasonably denied insurance coverage and  
23 provides for treble damages and an attorney fee award. See RCW 48.30.015(1)-(3). Accordingly,  
24 Plaintiff's claims for treble damages amount to \$160,000 (\$50,000 in contract damages x 3 pursuant  
25 to IFCA + \$10,000 CPA ceiling on treble damage).

1 In response to the petition of removal, Plaintiff filed a post-removal declaration stating that  
2 the amount being sought against Metropolitan will not exceed \$74,999. However, post-removal  
3 declarations, stipulations or other events that reduce the amount recoverable, whether beyond the  
4 plaintiff's control or the result of plaintiff's own volition, do not oust a court's jurisdiction once it  
5 has attached. See, St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 293 (1938);  
6 Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 872 (6<sup>th</sup> Cir. 2000); In re Shell Oil Co., 970 F.2d  
7 355, 356 (7<sup>th</sup> Cir. 1992); Simmons v. PCR Technology, 209 F. Supp.2d 1029, 1033 (N.D.  
8 Cal.,2002). There is a difference, however, between evidence that clarifies a complaint that  
9 previously left the jurisdictional question ambiguous and evidence introduced by a plaintiff that  
10 seeks to reduce, not clarify, the demand after removal. See, Marcel v. Pool Co., 5 F.3d 81, 85 (5<sup>th</sup>  
11 Cir.1993); see also, Gwyn v. Wal-Mart Stores, Inc., 955 F. Supp. 44, 46 (M.D. N.C. 1996) (“[U]ntil  
12 jurisdiction becomes determinate, the court may consider any evidence of the amount in  
13 controversy.”).

14 The Court finds that Plaintiff's declaration seeks to reduce, not clarify the demand for  
15 damages and cannot defeat jurisdiction. The damages Plaintiff seeks exceed \$75,000. Accordingly,  
16 Defendant has established the jurisdictional requirements by a preponderance of the evidence.

#### 17 Conclusion

18 For the foregoing reasons, Defendant has establish removal jurisdiction.

19 ACCORDINGLY;

20 IT IS ORDERED:

21 Plaintiff's Motion for remand (Objection to removal) [Dkt # 6] is **DENIED**.

22 DATED this 11 day of September, 2009.

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FRANKLIN D. BURGESS  
UNITED STATES DISTRICT JUDGE